(c) GROUND THREE: (See Attached) Ground 3

Supporting FACTS: (See Attached)

Did you raise GROUND THREE in the California Supreme Court?

☐ Yes ☒ No. Please See Request for Stay and Abegance (EXh. H)

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition):

(2) Case number or citation:

(3) Result (attach a copy of the court's opinion or order if available):

Ground 3

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when his defense counsel lacked the professional competency, expertise and experience to be his advocate by failing to request the trial court instruct the jury on appropriate and relevant jury instructions and failed to alert the trial court that they erred in failing to instruct the jury on previously agreed upon jury instructions. Petitioner offers the following

a. Supporting facts:

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his defense counsel should have objected to the trial court instructing the jury on Caljic 2.02 Sufficiency of circumstantial Evidence to prove specific intent or mental state and erred by failing to request the trial court instruct the jury on Caljic 2.01 Sufficiency of Circumstantial Evidence.

Petitioner notes that he was charged in Count 1 Residential Burgulary Pen C § 459 and 460. Count 2 charged Assault with a firearm Pen C § 245(a)(2). Count 3 charged possession of a firearm by a felon Pen C § 12021(a)(1) and Count 4 charged Possession of a deadly weapon Pen C § 12020. Both Counts 1 and 2 alleged a personal use of a

Ground 3 (Supporting facts continued:)

firearm enhancement allegation in violation of Pen C§ 12022.5(a) (See CT 01 and CT 02)

Petitioner asserts the trial court instructed the jury on Calgic 2.02 jury instruction for the specific intent in Count I (See CT 24; See also RT 288-89

However, petitioner claims that the defense counsel should have objected to the trial court instructing the jury on Calgic 2.02 and should have requested the trial court instruct the jury on Calgic 2.01, for all petitioner's alleged charges. Petitioner basis this claim on the following facts:

The use notes to Calgic 2.02 states: "Calgic 2.01 and Calgic 2.02 should never be given together. This is because Calgic 2.01 is inclusive of all issues, including mental state and/or specific intent, where as Calgic 2.02 is limited to just mental state and/or specific intent. Therefore, they are alternate instructions. If the only circumstantial evidence relates to specific intent or mental state, Calgic 2.02 should be given. [I]f the circumstantial evidence relates to other matters, or relates to other matters as well as specific intent or mental state, Calgic 2.01 should be given and not Calgic 2.02 [Citations] (See use note to Calgic No 2.02)

Ground 3 Supporting facts continued:

Wherefore, petitioner next claims that the circumstantial evidence in this case related to other matters, as well as specific intent and the defense counsel should have requested the trial court instruct the jury on Calgic 2.01, instead of Calgic 2.02. Petitioner basis this claim on the following facts: The trial court stated:

"I Guess the question is, is there any circumstantial evidence upon which the People are relying to establish any of the elements of the other counts charged?" (See RT 267 (21-24)).

Mr Link (the prosecutor): "Just the fact that he got into his car and sped away and threw the shotgun out the window, that all goes to ~~prove~~ the fact that he was trying to get away from the police for a greater crime than just felony possession of a firearm. (See RT 267 (25-28); RT 268)

Thus, the trial court refused to give Calgic 2.01 jury instruction. (See RT 268)

The prosecutor also relied on an inference of petitioner's guilt, that petitioner fled from the scene during his closing arguments to the jury (See RT 312; RT 313)

Ground 3 Supporting facts continued:

Moreover, the trial court did instruct the jury on Caljic 2.52 Flight after crime (See CT 35; See also 292-293) But as petitioner raised on direct appeal, that even if the flight instruction was appropriate, the pattern instruction required modification in this case (See Case No. D046320)

Here, because flight after a crime is substantial circumstantial evidence that even if the trial court did modify Caljic 2.52 instruction and instructed the jury it had to make a preliminary factual finding before it could infer any consciousness of guilt from petitioner's departure, since there was substantial evidence that showed an innocent reason for petitioner's departure and thus, warranting the need for Caljic 2.01 instruction.

Futhermore, if the jury is permitted to find a consciousness of guilt based on circumstantial evidence, without making the requisite factual finding as set forth in Caljic 2.01, the prosecution's burdened is lessoned and there is a danger of jury reliance upon an irrational or unjustified inference in violation of petitioner's Sixth and Fourteenth Amendments rights. Additionally, a preliminary fact finding as set forth in Caljic 2.01, was very important because the jury recieved evidence that petitioner's life had been

Ground 3 Supporting facts continued:

threatend by Chris Knox.

Jose Castro (the alleged victim) testified for the prosecution that: From June 2004 though September 2004, he lived with Rebecca Knox and Christopher Knox in their two bedroom apartment (See RT 27-28) During this time he had seen lots of arguments between Mr. Cunningham (petitioner) and Mr. Knox (See RT 39(10-19); RT 40(1-2)). Where as Chris Knox threatened to Kill petitioner ever since Castro moved into the Knoxes apartment. (See RT 40) The Knoxes apartment was right upstairs from petitioner's apartment (See RT 27)

Rebecca Knox (prosecution witness) testified that Christopher Knox and petitioner had previous arguments (See RT 80 (3-4))

Nina Talvera (prosecution witness) testified that Chris Knox yelled at petitioner, that he would kill petitioner if he returned. (See RT 70)

Petitioner testified that he was afraid of Chris Knox because of the bat and Chris threats (See RT 223) While petitioner stated on cross-examination that he left to avoid arrest (See RT 207; RT 208), there was substantial evidence demonstrating that petitioner left for innocent (safety) reasons and had nothing to do with consciousness of guilt inference permitted to the charged offenses. Also to the extent the jury might have inferred from the evidence that petitioner left because he was a felon in possession of a firearm, which would not have inferred guilt as to the major charges set forth in Counts 1 and 2. The jury could have also inferred from the evidence that the petitioner left to 'cool down' (See RT 219), just as he left the Knoxe's apartment, and should be encouraged by the law and certainly carried with it no consciousness of guilt.

Also, the 911 tape, which was played for the jury, and for which they had a transcript (See RT 76; RT 77), also revealed Chris Knox threatened to shoot petitioner in the face ["I'm going to shoot you in your face, you come up here again."] (See CT 9)

Where there is evidence that suggest a reason for a prejudicial circumstantial inference of guilt by flight other than consciousness of guilt, the trial court should have instructed the jury more specifically as to whether or not the evidence shows a consciousness of guilt, and what significance to attach to it, are questions of fact the jury must determine. Thus, a finding of guilt as to any crime may not be based on

Ground 3 Supporting facts Continued:

Circumstantial evidence unless the proved circumstances are not only (1) consistent with theory that petitioner is guilty of the crime, but (2) cannot be reconciled with any other conclusions (See Calgic 2.01)

The defense counsel's failure to request the trial court instruct the jury on Calgic 2.01, for all alleged charges, was an error of constitutional dimension in that it permitted the jury to infer guilt if it found that petitioner fled, without being instructed that it cannot be reconciled with any other conclusion, thereby lessoning the prosecution's burden and violating petitioner's right to trial by jury and due process. The permissible inference of guilt displayed by the defense counsel's failure to request the trial court sua sponte instruct the jury on Calgic 2.01, improperly undermined petitioner's presumption of innocence on all alleged charges.

Petitioner leaving the scene where his life had been threatened by a yelling man armed with a bat and threatening to shoot petitioner in the face, did not support the prejudicial circumstantial inference of guilt.

The defense counsel's failure to request the

Ground 3 Supporting facts Continued:

trial court instruct the jury on Caljic 2.01, left the jury's attention focused towards flight, and a highly prejudicial inference of guilt. Even though the instruction of flight was permissive, petitioner argues that flight was one type of substantial prejudicial circumstantial evidence of guilt that could "establish guilt" on all petitioner's alleged charges, and thus warranting the need for the ~~[illegible]~~ defense counsel to request the trial court instruct the jury on Caljic 2.01, instead of Caljic 2.02.

Petitioner next contends that the 911 tape which was played for the jury, and for which they had a transcript (See RT 76; RT 77; See also CT 8-14) was substantial circumstantial evidence supporting the need for the ~~[illegible]~~ defense counsel to request the trial court instruct the jury on Caljic 2.01, as to all petitioner's alleged charges. Petitioner basis this contention on the following facts:

1.) Petitioner proclaims that the 911 tape was circumstantial evidence because statements are nontestimonal when it the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. (As in this case)

Ground 3 Supporting facts continued:

2.) Further, circumstantial evidence is defined in (Blacks Law Dictionary) as 2. All evidence that is not given by testimony.

3.) The prosecution relied on the 911 tape "circumstantial evidence" during his closing arguments. (See RT 310-311)

4.) also not to go unnoticed, the jury requested to re-hear the 911 call "Circumstantial Evidence" during deliberation. (See RT 334 (2-6)).

5.) Indeed, the circumstantial evidence of the 911 tape was also susceptible of a reasonable interpretation and reconciled with other conclusions that pointed to the petitioner's: Specifically, Petitioner testified that he never pointed the gun at Mr. Castro (See RT 224 (7-8)), held the gun at his side the entire time (See RT 224 (9-11)) and never pointed it at anybody in the apartment (See RT 224 (12-14); See also RT 224 (25-28); RT 225 (1-2)).

Petitioner hereby concludes that the 911 tape was also yet another type of substantial prejudicial Circumstantial evidence of guilt that could "establish guilt" on all petitioner's alleged charges, which is proved by the fact that the jury wanted to re-hear the 911 call during deliberation (See RT 334)

Ground 3 Supporting facts Continued:

and thus, warranting the need for the defense counsel to request the trial court instruct the jury on Calgic 2.01 instead of Calgic 2.02.

Petitioner declares that, the fact that the trial court instructed the jury on Calgic 2.02 for Count 1 Residential Burgulary, and given the defense position, the jury returned a verdict of 'not guilty' on Count 1 (See RT 336-339), a reasonable person would only conclude that, had the jury been instructed on the general principles of Calgic 2.01 instruction, as to all counts, might have essentially tipped the scales in the petitioner's favor, especially as to Count 2 Assault with a firearm Pen C § 245(a)(2) and the jury would have also found the petitioner not guilty on Count 2.

In addition, not to belabor the point at all, the prosecution admitted that there was a lot of circumstantial evidence, during his closing arguments to the jury. (See RT 311 (3-5)). The prosecution also told the jury that they would get a circumstantial evidence instruction (See RT 322 (4-10)).

Therefore, petitioner argues that because the 911 tape and flight risk was circumstantial evidence alone, which was relied upon proof of guilt and this evidence was essential in order to procure his conviction (which is proved by the fact the jury wanted to re-hear the

Ground 3 Supporting facts continued:

911 tape during deliberation), the defense counsel was ineffective for failing to request the trial court instruct the jury on Caljic 2.01 Sufficiency of Circumstantial Evidence -- Generally as to all alleged charges, was not a harmless error and so painfully prejudiced the petitioner's ability to defend against the charges since the jury was never instructed on the necessary general principles of law that is governing circumstantial evidence and thus, reversal is required.

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his ~~appellate~~ defense counsel was ineffective for failing to object and alert the trial court that they prejudicially erred in failing to sua sponte instruct the jury that Caljic 3.30 'General Intent' applied to the lesser included offense Pen C § 240 and erred in failing to sua sponte instruct the jury that Caljic 9.00 'Assault Defined' is the same jury instruction for the lesser included offense of Simple Assault Pen C § 240 for Count 2 Assault with a firearm Pen C § 245(a)(2)

Petitioner notes that he was charged in Count 2 Assault with a firearm in violation of Pen C § 245(a)(2) (See CT 01 and CT 02). The trial court, prosecution

Ground 3 Supporting facts continued:

and defense agreed to instruct the jury on Simple Assault Pen C § 240, as a lesser included offense of Count 2 Assault with a firearm Pen C § 245 (a)(2). (See RT 274 (10-28); RT 275 (1-9)).

However, the trial court instructed the jury on Calgic 3:30 for Counts 2, 3 and 4, but upon further review of the Petitioner's Reporter's Transcript the defense counsel prejudicially erred in failing to alert the trial court that they erred in failing to sua sponte instruct the jury on Calgic 3.30 'General Intent' element of the lesser included offense of Simple Assault Pen C § 240 (See CT 39; see also RT 294 (1-10)).

Also not to go unnoticed, upon further review of the petitioner's Reporter's Transcript, the defense counsel prejudicially erred by failing to alert the trial court that they erred by failing to instruct the jury that Calgic 9.00 'Assault Defined' jury instruction was the same jury instruction for Simple Assault Pen C § 240. Petitioner makes this foregoing assumption on the following facts:

1.) Calgic 9.00 jury instruction is both the jury instruction for Simple Assault Pen C § 240 and 'Assault Defined' for any assault. (See Calgic 9.00 jury instruction.)

Ground 3 Supporting facts continued:

2) Being that petitioner was charged with Count 2 Assault with a firearm Pen C § 245(a)(2) (See CT 01 and CT 02), the trial court had to give Calgic 9.00 'Assault Defined' jury instruction for Count 2 Assault with a firearm Pen C § 245(a)(2) (See CT 44, CT 45; RT 295 (15-28); RT 296 (1-23); see also use note for Calgic 9.02 jury instruction)

3.) Moreover, when the trial court instructed the jury on the lesser included offense of Simple Assault Pen C § 240 (See CT the defense counsel prejudicially erred in failing to request the trial court either sua sponte re-instruct the jury on Calgic 9.00 Simple Assault Pen C § 240 Assault Defined, or at the minimum of minimums instructed the jury that the previously given Calgic 9.00 'Assault Defined' (See RT 295-297) applied to the lesser included offense of Simple Assault Pen C § 240 (See RT 299-301)

Petitioner proclaims that he was deprived of his Constitutional rights because the jury was never instructed or alerted to the general principles of law relevant to the lesser included offense of Simple Assault Pen C § 240 since the trial court gave no indication or even mentioned that the previously given Calgic 9.00 'Assault Defined' instruction (RT 295-297) was

Ground 3 Supporting facts continued:

the same exact jury instruction and elements for the lesser included offense Simple Assault Pen C § 240 (See RT 299-301)

Petitioner claims that since the defense counsel prejudicially erred in failing to object and alert the trial court that they erred in failing to sua sponte instruct the jury on the 'general intent' element of the lesser included offense of Pen C § 240 and prejudicially erred in failing to re-instruct the jury on Caljic 9.00 Simple Assault Pen C § 240 / Assault Defined, or at the minimum of minimums instructed the jury that the previously given 'Assault Defined' Caljic 9.00 jury instruction, was the same exact jury instruction and elements for the lesser included offense Pen C § 240, was not a harmless error: because the jury lacked the general principles of law relevant to the lesser included offense of Simple Assault Pen C § 240 for Count 2 Assault with a deadly weapon Pen C § 245 (a)(2) Had the jury been properly instructed on the foregoing jury instructions, elements and the general principles of law that is relevant to and governing the jury's proper understanding of the lesser included offense Simple Assault Pen C § 240, might have essentially tipped the scales in the petitioner's favor and the jury would have found in favor of the petitioner on the lesser included

Ground 3 Supporting facts continued:

offense of Simple Assault Pen C§ 240

Petitioner basis this claim on the following trial court's comment:

Well, there is evidence, though, of the -- Down on the ground floor kind of waiving the rifle towards the people on the balcony. That might be considered, I suppose, simple assault, if he wasn't aiming at anyone. (See RT 274 (25-28)).

Therefore, petitioner argues that for each of these foregoing reason, the defense counsel's failure to object, alert and request the trial court to sua sponte instruct the jury on the lesser included offense of Simple Assault Pen C§ 240 for Count 2 Assault with a firearm Pen C§ 245(a)(2), was not a harmless error and so painfully prejudiced the Petitioner's ability to defend against the charges since the jury was never instructed on the necessary general principles of law that is governing the essential elements of the lesser included offense of Simple Assault Pen C§ 240, so that the jury could arrive at a just verdict of Count 2 Assault with a firearm, and thus reversal is highly required.

Petitioner contends that he was denied his his Constitutional right to effective assistance of counsel and deprived of due process of the law when

Ground 3 Supporting facts continued:

his defense counsel was ineffective for failing to object and alert the trial court that they prejudicially erred by failing to sua sponte instruct the jury that Caljic 3.30 'General Intent' applied to Caljic 17.19, Personal use of a firearm enhancement allegation.

Petitioner notes that he was charged in Count 1 Residential Burgulary Pen C § 459 and Pen C § 460. Count 2 charged Assault with a firearm Pen C § 245 (a)(2). Both Counts also alleged a Personal use enhancement allegation in violation of Pen C § 12022.5 (a) (See CT 01 and CT 02)

Petitioner asserts that the trial court instructed the jury on Caljic 3.30 'General Intent', for Counts 2, 3 and 4. (See CT 39; See also RT 294 (1-10)). The trial court also instructed the jury on Calgic 17.19, for the personal use of a firearm enhancement allegation (See CT 50; Pen C § 12022.5 (a); See also RT 298-299 (1-5)).

However, upon further review of Petitioner's Reporter's Transcript, the ~~trial court~~ defense counsel prejudicially erred in failing to alert the trial court that they failed to instruct the jury that 'General Intent' applied to Calgic 17.19, the personal use of a firearm enhancement allegation Pen C § 12022.5 (a), as alleged in Counts 1 and 2 (See CT 39; RT 294 (1-10); See also RT 284-301)

Ground 3 Supporting facts continued:

Wherefore, the defense counsel's failure to object and alert the trial court that they failed to instruct the jury that 'General Intent' applied to Calgic 17.19, the personal use of a firearm enhancement allegation Pen C§ 12022.5(a), deprived the petitioner of his Fifth Amendment right because it lightened the prosecution's burden of proof of every element of a crime beyond a reasonable doubt. In addition, Calgic 17.19, thus has a major gap because it makes no mention of the mental state which must accompany the menacing display varity of personal use, in which Calgic 3.30 'General Intent' jury instruction must be given. Moreover, had the jury been instructed on the 'general intent' element in Calgic 17.19, as to the personal use of a firearm enhancement allegation Pen C§ 12022.5(a), might have essentially tipped the scales in the petitioner's favor and the jury would have found the petitioner 'not guilty' on the personal use of a firearm enhancement allegation, that the jury found him ~~not~~ guilty of in Count 2 (See CT 65; See also RT 336-339)

Therefore, Petitioner argues that the defense counsel's failure to object and alert the trial court that they prejudicially erred by failing to sua sponte instruct the jury on the 'general intent' element of Calgic 17.19 Personal use of a firearm enhancement allegation Pen C§ 12022.5(a), was not

Ground 3 Supporting facts continued:

a harmless error and so painfully prejudiced the petitioner's ability to defend against the charges since the jury was never instructed on the necessary general principles of law that is governing circumstantial evidence and thus, reversal is required.

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his court appointed appellate counsel was ineffective for failing to request the trial court instruct the jury that Pen C § 12022(a) or 12022.3(b), was a lesser included enhancement of personally using a firearm Pen C § 12022.5(a), as alleged in both Count 1 and 2.

Petitioner notes that he was found guilty of Count 2 Assault with a firearm Pen C § 245(a)(2) and a Personal use of a firearm enhancement allegation in violation of Pen C § 12022.5(a) (See CT01 and CT02).

Petitioner claims that his defense counsel should have requested the trial court to instruct the jury on the element of Pen C § 12022(a) or Pen C § 12022.3(b) as a lesser included enhancement because

Ground 3 Supporting facts continued:

the jury had evidence deserving of consideration which would support a finding that the petitioner was only armed but did not use the weapon.

Where fore, had the jury been instructed on the lesser included offense of Personally armed with a firearm Pen C§§ 12022(a) or 12022.3(b) for the Personal use enhancement allegation Pen C§ 12022.5(a) that the petitioner was found 'guilty' of in Count 2 (See CT 65; See also RT 336-339), it is more likely than not that the jury would have opted to choose the lesser included enhancement allegation. Petitioner basis this argument on the following supporting testimony:

Petitioner testified that on September 12, 2004, he was employed as an automation general welder, and also did part time landscape work on the weekends. (See RT 210; RT 211; RT 216) He lived in Bella Vista apartments where he had lived for 16 or 17 months (See RT 211)

In September 2004, petitioner had Known the Knoxes for about a year. (See RT 212) Petitioner would lend Rebecca Knox money, gives her rides or anything like that (See RT 212; RT 213) Chris Knox and petitioner were friends at first (See RT 213), but a few months before September 2004, Chris

Ground 3 Supporting facts Continued:

Knox threatened petitioner with a bat after petitioner confronted Rebecca Knox about putting a "bogus check" into petitioner's account (See RT 214; RT 215) Chris Knox then flew off the handle and threatened to hit petitioner with a bat. (See RT 215).

On September 12, 2004, petitioner worked a side landscaping job (See RT 215). He left home around 5:00 or 5:30 pm and returned around 10:00 or 10:30 pm. Before leaving, he saw Castro and Chris Knox. He did not know Castro and was not speaking with Mr. Knox. (See RT 216) When petitioner, left, he left his window open because it was over 100 degrees (RT 217; RT 233) When he returned home, he found his daughter's bike missing and someone had pried open the screen on his window. Some of his daughter's clothes were missing along with his cell phone and some personal checks (See RT 218) and petitioner was baffled about it. Petitioner then asked his neighbors in apartment number two if they saw anyone (See RT 218) Petitioner then saw Rebecca Knox, Castro and some other people on the balcony of the Knoxes apartment looking down on him (See RT 219) Petitioner asked them if they saw anyone and they got 'sarcastic' with petitioner. Petitioner then went inside his apartment to cool down (See RT 219).

Ground 3 Supporting facts continued:

Petitioner then went upstairs to the Knoxes apartment, looking for Rebecca Knox (See RT 219 (27-28) and see if he could retrieve his property (See RT 220) Petitioner claimed that they had taken property in the past and when items were missing in the apartment complex, they were the first to contact (See RT 220) Petitioner also claimed that the Knoxes prior roommates took things from his balcony and out of his home prior to this (See RT 235 (15-18)). Castro then told Petitioner that Rebecca Knox would be back in about 15 minutes (See RT 221) When petitioner returned, he saw Rebecca and other people on the Knoxe's balcony that were yelling at him (See RT 222) Petitioner then went inside his house and armed himself with his shotgun (See RT 222) Petitioner had obtained the shotgun 6 months earlier, after being jumped at the apartment complex, in which he was hit in the head, requiring 16 stitches (See RT 222 (19-23)) and was afraid of Chris Knox because of the bat and Chris threats (See RT 223).

Petitioner was told by Rebecca Knox that he could come up and look for his property (See RT 223) Petitioner did not go inside the Knoxes' apartment because Chris Knox came out with a bat. (See RT 223.) Petitioner said that he

Ground 3 Supporting facts continued:

would get back at them and call the police (See RT 224)

Petitioner denied hitting Castro, denied pointing a gun at Castro (See RT 224 (7-8)) and held the gun at his side the entire time (See RT 224 (9-11)) Petitioner also denied ever pointing the gun at anybody in the apartment (See RT 224 (12-14); See also RT 224 (25-28); RT 225 (1-2)). Petitioner contended that the only contact that he had with Castro was to ask him if he had petitioner's phone (See RT 225).

Petitioner then went downstairs and to his car. Meanwhile, Chris Knox was yelling threats at petitioner (See RT 226) Petitioner laid the gun on the floor board of his blue toyota truck. Then he drove towards the freeway to head west (See RT 227), and planned to go to his mother's residence (See RT 256). When petitioner saw the police follow him, he threw the gun out the window because he was afraid of getting shot (See RT 227) Petitioner then immediately submitted to law enforcement authority and corporated fully when he was stopped (See RT 159; RT 164)

Nina Talvera (prosecution witness) testified that she lived at Bella Vista apartment and awoke the night of September 12, 2004, to lots of yelling (See RT 168; RT 169) She saw appellant with

Ground 3 Supporting facts Continued:

Something in his hands – either a gun or a bat (See RT 170). Chris Knox yelled at petitioner that he would Kill petitioner if he returned (See RT 170), petitioner raised the [redacted] item in the air (See RT 170), pointing it straight up (See RT 172(24-28)) He wasn't neccessarily aiming it (See RT 173(1-2)) and Kept walking towards the parking lot (See RT 173).

William Bloomfield (prosecution witness) a 'armed' security officier at the apartment complex (See RT 108), testified that he was on patrol the night of September 12, 2004, when he heard yelling, "he has a gun" (See RT 102) He then noticed petitioner had a gun down to his side (See RT 104(19-28)); RT 111(23-28)) and never threatened anybody with the gun (See RT 112(1-26)) The petitioner then walked to his truck. (See RT 113).

In addition, the trial court made the following comment:

"Well, there is evidence, though, of the -- Down on the ground floor Kind of waiving the rifle towards the people on the balcony. That might be considered, I suppose, simple assault, if he wasn't aiming it at anyone." (See RT 274 (25-28)).

Thus, the trial court's comment alone prove that petitioner was only armed with a firearm. Also Petitioner

Ground 3 Supporting facts Continued:

did not deny being armed with the firearm, Petitioner asserts that he did not use the firearm. Moreover, Petitioner argues that his testimony was the only testimony offered in his defense to the altercation. However, Petitioner declares that when his testimony is taken in context along with the additional prosecution witnesses, is proof positive, that there is substantial evidence supporting the need for, the ~~[illegible]~~, defense counsel to request the trial court instruct the jury on the lesser included enhancement allegation of Personally armed with a firearm Pen C § 12022 (a) or Pen C § 12022.3 (b). Had the defense counsel been effective and requested the lesser included Personally armed with a firearm enhancement allegation Pen C § 12022 (a) or Pen C § 12022.3 (b), the jury might very well have choose the lesser and the petitioner would have recieved a far better sentence because ~~[illegible]~~ the personally armed with a firearm enhancement Pen C § 12022 (a) or Pen C § 12022.3 (b), carries 1 year in State Prison, while Personally using a firearm Pen C § 12022.5 (a), carries a minimum of 3 years in State Prison.

Therefore, for each of these aforementioned reasons and foregoing testimony, the defense counsel's failure to request the trial court instruct the jury on the elements that Pen C § 12022 (a) or

Ground 3 Supporting facts continued:

Pen C § 12022.3(b), was a lesser included enhancement for the personal use of a firearm enhancement Pen C § 12022.5(a), was not a harmless error, and thus reversal on the Personal use of a firearm enhancement allegation Pen C § 12022.5(a) is highly required.

Petitioner also notes that each of the aforementioned claims has been expressed in Ground 1 (Argument 1-4) and Supporting cases, rules or other authority can also be veiwed therein.

Petitioner hereby argues that each of these foregoing reasons, the failure of defense counsel to object, alert and or request the trial court instruct the jury on each of these aforementioned "jury instructions" constituted ineffective assistance of counsel and was not a harmless error. Petitioner further argues each of the aforementioned jury instructions were either a general principle of law or pinpointed to the petitioner's defense and thus were relevant to the jury's proper understanding of how the facts and the law applied in this case. Each missing jury instruction alone was prejudicial to the petitioner's ability to defend against the charges and each alone deprived him of his Fifth, Sixth and Fourteenth Amendment rights and therefore the defense counsel's failure to request each of the aforementioned jury instruct was not a harmless error and as such requires reversal.

Ground 3 (Argument 2)

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when his defense counsel was ineffective for failing to request the trial court modify Caljic Number 252, the statutory flight instruction upon instructing the jury.

Supporting facts:

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his court appointed defense counsel erred in failing to request the trial court modify Caljic Number 2.52, the statutory flight instruction upon instructing the jury.

During a conference on jury instructions, the People requested that the Court instructed the jury regarding the inference a jury may draw based on a defendant's flight after the commission of a crime (See RT 273) The Court indicated that it intended to instruct the jury pursuant to Caljic No. 252 (See RT Defense counsel objected, stating: "I dont think what happened was sufficient with flight." (See RT 273) The Court overruled the objection and gave the instruction. (See RT 273)

The trial court instructed the jury pursuant to

Ground 3 (Argument 2) Supporting facts Continued:

Caljic No. 252 as follows:

"The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide." (See RT 292)

Petitioner claims that, assuming there was substantial evidence to support the giving of a flight instruction, the defense counsel erred by failing to request the trial Court modify the standard Caljic No 2.52. instruction, Specifically, petitioner argues that there is substantial evidence that ~~should~~ showed an innocent reason for petitioner's departure, because his life had been threatened by Chris Knox and that, therefore, the defense counsel should have requested the trial court modify the pattern instruction, and also instructed the jury it had to make a preliminary factual finding regarding whether petitioner departed the scene to avoid arrest before it could consider whether his flight evidenced a consciousness of guilt. Petitioner basis this argument on the following trial court's testimony:

Jose Castro (the alleged victim) testified for the

Ground 3 (Argument 2) Supporting facts continued:

prosecution that: from June 2004 through September 2004, he lived with Rebecca and Christopher Knox in their two bedroom apartment (see RT 27-28) During this time he had seen lots of arguments between Mr. Cunningham (petitioner) and Mr. Knox (see RT 39 (10-19); RT 40 (1-2)) Where as Chris Knox threatened to kill petitioner ever since Castro moved into the Knoxes apartment (see RT 40) The Knoxes apartment was right upstairs from petitioner's apartment (see RT 27).

Rebecca Knox (prosecution witness) testified that Chris Knox and petitioner had previous arguments (see RT 80 (3-4)).

Nina Talvera (prosecution witness) testified that Chris Knox yell at petitioner that he would kill petitioner if he returned. (see RT 70)

Petitioner testified that he was afraid of Chris Knox because of the bat and Chris threats (see RT 223) While petitioner stated on cross-examination that he did not leave to aviod arrest (see RT 257 (6-22), the was also substantial evidence demonstrating that petitioner left for innocent ~~reasons~~ (Safety) reasons and had nothing to do with consciousness of guilt inference permitted to the charged offenses. The jury could have also inferred from the evidence that the petitioner left

Ground 3 (Argument 2) Supporting facts continued: to "cool down" (See RT 219), just as he left the Knoxes apartment, and should be encouraged by the law, and certainly carried with it no consciousness of guilt.

Also, the 911 tape, which was played for the jury, and for which they had a transcript (See RT 76; 77), also revealed Chris Knox threatened to shoot petitioner in the face ["I'm going to shoot you in your face, you come up here again."] (See CT 9)

In addition, even though petitioner admitted that while he was being pursued by the police, he threw the shotgun out the window of his car (See RT 227 (20-21). Thus, there was clearly evidence from which the jury could reasonably infer that petitioner's flight did not reflect a consciousness of guilt because petitioner stated: he threw the shotgun out of the window from fear of being shot by the police (See RT 227 (23-25) and immediately pulled over and parked (See RT 226 (26-28)

Thus, for each of these foregoing reasons the defense counsel should have requested the trial court instruct the jury to make a fact finding before considering flight as consciousness of guilt. When ever this preliminary fact is in question, the defendant has a right to an instruction

Ground 3 (~~Argument~~ 2) Supporting facts Continued:

requiring the jury to determine whether the preliminary fact necessary to establish the relevance of the evidence exists and to disregard the evidence unless the jury finds that the preliminary fact does exist.

Analytically, flight is an admission by conduct its probative value as circumstantial evidence of guilt depends upon the degree of confidence with with four inferences can be drawn: (1) from ~~flight to consciousness~~ the defendants behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Wherefore, if the jury is permitted to make a consciousness of guilt without making the requisite preliminary factual findings, the prosecutions burden is lessoned and there is a donger of jury reliance upon an irrational or unjustified inference in violation of the petitioner Sixth and Fourteenth Amendment rights.

In this case, the defense counsel should have requested the trial court modify Caljic 2.52 instruction to read;:

Ground 3 (Argument #2) Supporting facts Continued:

"Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such circumstance, are matters for your determination".

Therefore, petitioner argues that due to his defense counsels failure to request the trial court modify Caljic 2.52, was an instructional error of constitutional dimension in that it permitted the jury to infer guilt if it found that petitioner fled; violated petitioners right to trial by jury. The permissible inference of the instruction improperly undermined petitioner's presumption of innocence. Petitioner leaving the scence where his life had been threatened by a yelling man armed with a baseball bat and who threatened to shoot petitioner in the face, did not support an inference of guilt. Moreover, the instruction directed the jury's attention to flight. Even though the instruction was permissive, the instruction suggested that flight was one type of evidence of guilt that could "establish guilt."

Based on the foregoing, the petitioner was prejudiced by the defense counsel's failure to request the trial court modify the statutory flight instruction, and thus petitioner's conviction on all counts should be reversed.

Ground 3 (Argument 3)

Petitioner was deprived of his Fourth, FiFth, Sixth and Fourteenth Amendment rights when his defense counsel erred in failing to file a motion to suppress evidence, two guns, that was obtained at petitioner's residence as a result of a warantless search and seizure.

Supporting facts:

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his court appointed defense counsel was ineffective for failing to file a motion to suppress two guns that the prosecution presented during trial, that was obtained at petitioner's residence as a result of a warantless search and seizure.

Petitioner asserts that the prosecution presented these two guns at petitioner's trial (see RT 183-184)

Petitioner claims that the defense counsel was ineffective for failing to file a motion to suppress the prosecution from presenting these two guns, which were obtained on an illegal search and seizure. Petitioner basis this claim on the following facts:

1.) Petitioner notes that Debra Teich is the manager of the apartment complex where he lived. (See RT 182). Petitioner was arrested on September 12, 2004 (see CT 01 and CT 02) Additionally, Teich testified that she had to re-rent the apartment, went through the eviction process and got a

Ground 3 (Argument 3) Supporting facts Continued:

lockout order. Teich, testified that on October 7, 2004 approxiamately 3 weeks later she had to move petitioner's items and found two shotguns in the closet (See RT 183) Teich called the police (See RT 183) the two guns were confascated. The prosecution then presented these two guns at petitioner's trial (RT 183-184)

Petitioner next claims that these two guns were obtained on an illegal search and seizure on the grounds that Teich, the manager of the apartment complex could never had evicted the petitioner and recieved a lockout order on or about October 7, 2004, approxamently a little over 3 weeks after petitioner was arrested. Petitioner basis this claim on the following facts:

1.) Petitioner was arrested on September 12, 2004. (See CT 01; CT02) and petitioner had previously paid his rent for the month of September.

2.) According to Teich, the apartment manager, petitioner was not being evicted on September 12, 2004 (See RT 185)

3.) Beings that if the petitioner was going to be evicted on or after September 12, 2004, Teich, the manager was required by law to give the petitioner a 30 day eviction notice, until on or after October 12, 2004.

4.) Even assumming that petitioner did not pay his rent for the month of September, according to Teich the manager, he was not being evicted as of Sep. 12, 2004. Thus, the manager

Ground 3 (Argument 3) Supporting facts Continued:

was required to give the petitioner by law a 3 day notice to pay or quit and if petitioner had not yet paid within the 3 days Teich, the manager was required to give the petitioner a 30 day eviction notice, until on or after October 12, 2004.

5.) The same event would have occurred if petitioner: was required to pay rent for the month of October. Teich, the manager was required to give a 3 day notice to pay or quit. If petitioner never paid within the 3 days, Teich, the manager was required to give the petitioner a 30 day eviction notice and the petitioner was not to be evicted, until on or before November 3, 2004.

6.) In addition, petitioner paid first and last months rent (which all apartments required) and thus, if all else failed from the day Petitioner was arrested on September 12, 2004, he at the minimum of minimums had at least until October 12, 2004 before he could be evicted.

Wherefore, based on each of these foregoing reasons Teich, the apartment manager could never by laws evict the petitioner and get a lock out order on or before October 7, 2004, as she once testified to. (See RT 183)

Therefore, petitioner argues that since Teich, the apartment manager was illegally searching and seizing the petitioner's property when she allegally found these two guns

Ground 3 (Argument 3) Supporting facts Continued:

and even though she called the police, and the police came and confiscated these two guns, these two guns were obtained as a result of an illegal ~~w~~ warrantless search and seizure.

Petitioner next argues that his defense counsel was ineffective for failing to file a motion to suppress these two guns that the prosecution presented during trial, that was obtained on an illegal search and seizure. Moreover, petitioner was prejudicied by the defense counsel's complete failure to file a motion to suppress these two guns because he was deprived of his ~~$~~ Fourth Amendment right to the United States Constitution

Moreover, common sense sujests that when bringing these two additional gun into trial and in the presense of the jury not only conveyed a wrongful prejudicial impression, but it displayed a highly prejudicial inference of guilt on the petitioner in the mind of any reasonable tryer of fact of the jury. In addition, this impression of greater guilt translated into a harsher sentence and excessive punishment which translates to cruel and unusual punishment that violates petitioner's Eighth Amendment right.

Futhermore, what the petitioner's defense counsel was thinking was absoutely far-a-field from a defense attorney acting diligently as a conscientious advocate of his defendant / Client's interest. Because the failure to file a motion ~~to~~

Ground 3 (Argument 3) Supporting facts Continued:

to suppress these two guns was not a strategic decision that reason or common sense would justify and petitioner asserts that his defense counsel's advocacy fell far short of any reasonable standard for the provision of effective assistance of counsel. There is also more than a reasonable probability that absent the defense counsel's unproffessional errors, the result of the proceeding would have been the same. The defense counsel's failure to file a motion to suppress this evidence that was obtained on an illegal search and seizure was highly prejudicial and can never be viewed as a sound strategic trial strategy, or as a harmless error. Certainly this type of mistake or complete incompetence by his defense counsel can not be condoned as being in any-way adequate in meeting the standard of legal proffessional assistance as envisioned by the Sixth Amendment to the United States Constitution. Here: the defense counsel has failed to use every fundamental approach in assisting the petitioner in obtaing a fair and meaningful trial and making sure that the petitioner's Constitutional right's are not violated, and thus, since the defense counsel failed to protect the petitioner's Fourth Amendment to the United States Constitution and the Federal Constitution when he failed to object to the prosecution presenting these two guns at petitioner's trial that was obtained on an illegal search and seizure, the petitioner's conviction should be reversed.

Ground 3 (Argument 4)

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when his defense counsel commited a prejudicial error by failing to object to the trial court instructing the jury on Caljic 17.01.

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his defense counsel was ineffective and commited a prejudicial / reversiable error by failing to object, and thus, allowed the trial court to instruct the jury on Caljic 17.01 "Verdict may be based on a number of unlawful acts." for Count 2.

Petitioner notes that on or about September 12, 2004, he was charged with an assault upon Jose Castro with a firearm, in violation of Penal Code Section 245(a)(2) (See CT 01 and CT 02).

Petitioner asserts that he went to trial and after all the evidence was presented, both the defense and the prosecution rested (RT 265) The trial court then instructed the jury on several jury instructions (RT 284-301) It wasn't until after both the prosecution and defense presented their closing arguments, that the trial court decided to give Caljic 17.01, defense counsel

Ground 3 (Argument 4) Supporting facts continued:

and prosecution agreed (RT 322; 323)

Petitioner claims that he was denied his Constitutional rights to know the charges against him, denied his Constitutional rights to a fair trial and deprived of due process of the law when the defense counsel prejudicially erred in failing to object to the trial court prejudicially instructing the jury on Caljic 17.01 "Verdict may be based on one of a number of unlawful acts. Petitioner basis this claim on the following facts: The trial court stated:

The Court "And just for the record, there was one additional instruction that I just discussed with the attorney's that the Court will give. It is Caljic 17.01, and both attorney's have agreed to it.".

"The defendant is accused of having committed the crime of Assault with a firearm in Count 2. The prosecution has introduced evidence for the purpose of showing that there is more than one act which a conviction on Count 2 may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed anyone or more of the acts. However, in order to return a verdict of guilty to Count 2, all 12 jurors must agree that he committed the same act. It is not necessary that the particular act agreed upon be stated in your verdict." (See RT 322 (19-28)).

"Now let me explain what that means. You've heard evidence of certain events that occured inside the apartment.

Ground 3 (Argument 4) Supporting facts continued:

You've also heard evidence, I believe, of the defendant holding the gun in a certain manner while he was downstairs, I think, in the parking lot. The prosecution has argued that either one of the events could support a conviction for Count 2. What ~~that means~~ this instruction means is that all 12 of you just agree on which event or act occured before you can find the defendant guilty." (RT 323 (1-9)).

"If for example, 6 jurors feels that what happened in the apartment is sufficient for a guilty of Count 2, but not what happened downstairs, and the other 6 think downstairs but not what happened up in the apartment, you can't go 6 plus 6 to make 12. All 12 of you have to agree that the defendant committed the same act in order to find him guilty of Count 2. You can't go 6 and 6 or 8 and 4 (See RT 323 (10-16)).

Petitioner proclaims that these are the judge's statements to Caljic 17.01. However, petitioner basis this argument on the following facts:

Petitioner makes notice that he was only charged with one Count of assault upon Jose Castro with a firearm, in violation of Pen C § 245(a)(2). (See CT 01 and CT 02).

Petitioner claims that he was prejudicially denied his Constitutional rights to know the charges against

Ground 3 (Argument 4) Supporting facts continued:

him, prejudicially denied his Constitutional right to confront and cross-examine the witness against him and prejudicially deprived of due process of the law when the defense counsel was ineffective and committed a prejudicial error by failing to object to the trial court instructing the jury on Caljic 17.01

Petitioner asserts that he exercised his Constitutional rights to a fair and impartial jury trial and after all the evidence was presented, both the defense and the prosecution rested their case (RT 265). The trial court then instructed the jury on several jury instructions. (RT 284-301) It wasn't until after both the prosecution and defense presented their closing arguments, the trial court decided to give Caljic 17.01 jury instruction (RT 322; 323).

However, since the defense counsel committed a prejudicial error by allowing the trial court instruct the jury on Caljic 17.01, gave the jury an alternate theory from which the petitioner could be found 'guilty' of for Count 2 Assault with a firearm, Pen C§ 245(a)(2) The alternate theory was based on evidence the prosecution presented during trial, that the petitioner pointed the gun while down in the parking lot. Petitioner offers the following facts light most favorable to the

Ground 3 (Argument 4) Supporting facts continued:

prosecution's evidence:

Nina Talvera, testified that she lived in Bella Vista apartments (RT 168) and awoke on the night of Sep. 12, 2004, to lots of yelling (RT 169). Talvera stated she lived on the ground level and was about 20 feet from the altercation (RT 170 (1-7)). Talvera next gave the following testimony:

"I saw Mr Cunningham coming downstairs with something in his hand, and Chris was yelling at him, and they were yelling at each other. And, then, when Mr. Cunningham was on the ground, he had something at his side. I couldn't tell whether it was a bat. It looks like a bat from where I was. And he-- and then Chris, Mr. Knox, told him that he if he came up there again, he would Kill him. And then Chris -- or sorry -- Mr. Cunningham yelled back at him, and he raised the -- what I thought was a bat -- in the air (See RT 170 (9-17))

Talvera told the police that it could have been a bat or a gun (RT 170 (18-27)). Talvera also stated that Cunningham was yelling back at (Christopher Knox) same type of things (See RT 172 (18-22)). (Deducted from the prosecution evidence apparently, since Chris Knox

Ground 3 (Argument 4) Supporting facts continued:

told petitioner that he would Kill him, petitioner was also telling Christopher Knox that he would kill him). While, Talvera stated Castro was also standing and yelling from the top of the stairs (RT 173). Castro testified that he was in the room the entire time (RT 35 (17-25)).

Additionally, the prosecution asked Talvera the following questions:

By Mr. Link: (Prosecutor) Q: "When Mr. Knox was yelling down into the parking lot, was the defendant yelling back"?

Talvera (the witness): A. "yes"

Mr. Link: (prosecutor) Q. At some point, you said he pointed whatever it was a bat or a shotgun, towards Mr. Knox"?

Talvera (the witness): A. "Up that way"

Talvera (the witness): A. "Up in that direction"

(See RT 174 (19-26)).

In addition, the prosecution made the following statements to the jury during closing arguments:

"Thats as far as just being down in the parking lot and pointing it upwards and saying, "I'm going to F-ing Kill you." Thats an assault with a deadly

Ground 3 (Argument 4) Supporting facts continued:

Weapon (See RT 308 (1-2)) "We've got assault's with a deadly weapon all over the place." (See RT 308 (3-4)).

Thus, presented from the prosecution's perspective, and if the jury believed Talvera Testimony, there would be reasonable substantial evidence presented that, while petitioner was down in the parking lot, he pointed the gun towards Christopher Knox on the balcony and even though Chris Knox and petitioner was yelling back and fourth, they both apparently threatened to kill each other. (Which would be consistent with a finding of an assault upon Chris Knox, in violation of Pen C § 245 (a) (2).

Also not to go unnoticed, while the trial court stated "the victim in this case is Castro, not Knox" (RT 179 (18-19)), and "the People aren't going to be allowed to argue that he's a victim of any of these crimes" (RT 179 (21-22) was an erroneously given statement and a prejudicial error on the part of the trial court for instructing the jury on Caljic 17.01 (See RT 322)

However, it was also a prejudicial error on the part of the defense counsel for failing to object, and thus, allowing the trial court to instruct the jury on Caljic 17.01 (See RT 322) and explaining to the jury

Ground 3 (Argument 4) Supporting facts continued:

that they could find the petitioner 'guilty' of an alternate theory as to Count 2 (See RT 323), (if the evidence shows that petitioner pointed the gun and was yelling threats at Christopher Knox (RT 174 (19-26)), while down in the parking lot, advertenly or inadvertenly prejudicially made Christopher Knox an alleged victim, as to petitioner's Count 2 Assault with a firearm, in violation of Pen C§ 245 (a)(2).

Petitioner asserts that the jury would have had to reject Castro's alleged assault and more likely than not excepted the alternate assault, while down in the parking lot because as Castro testified, that on September 12, 2004, the day this incident occured he was taking medication (RT 42), he was feeling confused (RT 42-43 (1-8)), his memory was a little fuzzy and has a mental disorder. (RT 48 (15-22)). Castro testified, they call him 5150 (RT 49), he hears things, noise, a lot of yelling and him and "most importantly," People comes to Kill him (RT 50 (8-10)), similiar to the events that occured in the apartment (RT 50 (13-14)). Moreover, the jury would have had to reject Castro's testimony because the jury found Petitioner 'not guilty' on Count 1 Residential Burgulary (See RT 336), so this was a close case

Ground 3 (Argument 4) Supporting facts continued:

and since Castro testified that petitioner busted/threw in the door (RT 30-31), had a short rifle (RT 31-32), put his hand on the trigger (RT 32), put the gun to Castro's throat (RT 32) and stated, I'll come back and kill you all (RT 33 (1-19)). (All of which would have supported a guilty finding on Count 1 Residential Burgulary).

Therefore, for each of these foregoing reasons, petitioner argues that since the defense counsel was ineffective and committed a prejudicial/reversable error by allowing the trial court to instruct the jury on Caljic 17.01 (See RT 322-323), after both the defense and the prosecution rested their case (RT 265) prejudicially denied him of his Constitutional rights to a fair trial and due process of the law because petitioner was never advised of the charges against him (that Chris Knox was an alleged victim to Count 2 Assault with a firearm Pen C § 245 (a)(2). Wherefore, at the very least, there was no time or opportunity to craft a defense, no opportunity to consult with legal counsel for the purpose of participating in his own defense, or ~~and thus~~ no opportunity to speak in his own defense, and thus, was taken by suprise by not only evidence offered at trial, but also by an errouneously given Jury instruction Caljic 17.01, that petitioner's defense

Ground 3 (Argument 4) Supporting facts continued:

counsel prejudicially allowed the trial court to give. Petitioner also argues that most importantly, since the defense counsel failed to object to the trial court instructing the jury on Caljic 17.01, prejudicially made Chris Knox an alleged victim, and prejudicially denied petitioner of his Constitutional rights to a fair trial, prejudicially denied petitioner his Constitutional rights to confront and cross-examine the witness against him and prejudicially deprived the petitioner of due process of the law

because "Christopher Knox" was never called as a witness during trial (See RT 180(4-6)), and thus, reversal is highly, highly required!!!

Ground 3 (Supporting facts Continued:) (Closing)

Petitioner hereby argues that each of the several foregoing instances and seperate arguments constitutes ineffective assistance of counsel. Each alone significantly prejudiced against his ability to defend himself against the charges, and each alone sufficiently deprived him of his Fifth, Sixth and Fourteenth Amendment rights. Petitioner further ~~argues~~ Contends that cumulatively, there is more than substantial and sufficient support to indicate that petitioner did not have the benefit of effective assistance of counsel as envisioned by the Sixth and Fourteenth Amendments. Wherefore the compounded defects in the defense counsels performance so severly prejudicied against any reasonable expectation of the petitioner's ability to defend ~~against~~ against the charges, and so hope~~lessly~~ lessly damaged his opportunity to prevail in these proceedings. Therefore, for these many and various reasons, Justice requires at the minimum of minimums the verdict be put aside in this matter and the petitioner be granted a new trial.

GROUNDS FOR RELIEF

22. **State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground.** (e.g. what happened during the state proceedings that you contend resulted in a violation of the constitution, law or treaties of the United States.) If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) GROUND [redacted] Four: (See Attached Ground 4)

Supporting FACTS: (See Attached)

Did you raise GROUND ONE in the California Supreme Court?

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): Petition for Review

(2) Case number or citation: D046320

(3) Result (attach a copy of the court's opinion or order if available): Review denied

Ground 4

The trial court erred by denying petitioner's request to cross-examine Rebecca Knox regarding her prior domestic violence accusations against her husband, Christopher Knox, which she later recanted, and thereby violated petitioner's State and Federal Constitutional rights to present a defense and to cross-examine witnesses against him.

Supporting facts:

Rebecca Knox was one of the principal prosecution witnesses. Her credibility was crucial to the prosecution's case. The evidence presented a classic credibility contest between Rebecca Knox and Castro, on the one hand, and petitioner, on the other hand. Petitioner sought to introduce evidence that Rebecca made accusations of domestic violence against her husband, Chris Knox and then withdrew the accusations (RT 12) The trial court erred by excluding the evidence (RT 13)

The trial Court's error in excluding the evidence violated petitioner's federal constitutional rights to present a defense and to confront and cross-examine the witnesses against him.

The constitutional guarantee of "a meaningful opportunity to present a defense is grounded in the due process clause of the Fourteenth Amendment and the

Ground 4 Supporting facts continued:

compulsory process or confrontation clauses of the Sixth Amendment. This right includes the right to impeach witnesses at trial.

The Sixth Amendment right of confrontation imposes limitations on the trial court's ability to restrict the scope of cross-examination of prosecution witnesses. The law is well established that a defendant has a right under the Sixth Amendment Confrontation Clause to admit evidence showing a motive to make false accusations.

The Confrontation Clause guarantees the defendant in a criminal prosecution the right of cross-examination, which includes exploration of bias and motive to accuse falsely. A defendants right to present his theory is a fundamental right, and all of his pertinent evidence should be considered by the trier of fact. While the admission of evidence pursuant to section 352 is within the discretion of the trial court, "the exercise of such discretion 'should favor the petitioner in cases of doubt.'"

The credibility of a witness is, of course, always in issue. Relevance evidence that supports or attacks credibility is proper. More specifically, a witness character for honesty or veracity or their opposites is a factor the jury may consider in determining credibility.

Petitioner had evidence of Rebecca Knox's

Ground 4 Supporting facts continued:

dishonesty or untruthfulness in making criminal accusations. Either she had been untruthful in making domestic violence accusations against her husband, or she had been less than truthful in withdrawing them. The fact that the accusations concerned domestic violence, a situation in which false or recanting accusations occur with some frequency, did not remove the matter from the province of the jury, but rather was another factor for the jury to consider in determining the weight of the evidence on Rebecca Knox's credibility.

Thus, the California Evidence Code now more closely parallels the Federal Rules of Evidence, which expresely permits cross-examination about untruthful acts. The California Supreme Court also approved admissions of specific instances of conduct of a witness to impeach credibility.

Thus, acts of moral turpitude are admissible for impeachment purposes, whether or not those acts resulted in a conviction of any type.

Petitioner properly sought to impeach Rebecca Knox with her conduct evidencing untruthfulness in the specific context of making criminal accusations (RT 12) Counsel explained:

"Mr. Gulley: Yes Your Honor. Rebecca Knox will be testifying. Ms. Knox previously filed a report accusing

Ground 4 Supporting facts continued:

her husband of a domestic violence situation. She then recanted the statements after her husband was arrested. Charges were dropped against him. I think this goes toward her credibility. Unfortunately, I left the file in my office, I would like to use that to impeach her in terms of her credibility today and what she said to the police at the time. (RT 12)

The court excluded the evidence, citing "the time it will take to bring it in," and "the trial within a trial that it will most certainly would require." (RT 13) The ruling was error. First, the cross-examination was entirely proper. Second, as the court acknowledged the evidence was relevant. (RT 13) It was not only relevant to Rebecca Knox's credibility, but also Chris Knox's reputation for violence. Third, the court's justification for excluding the evidence was meritless. It would have taken very little time to question Rebecca Knox about her earlier accusations and recanting.

The general rule is that this type of error requires reversal if it can be said a result more favorable to petitioner would have been obtained absent the error. But because the trial court's exclusion of the above evidence denied petitioner his right of confrontation, the judgement of guilt should be reversed unless the error

Ground 4 Supporting facts Continued

was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

The trial court's exclusion of impeachment evidence against Rebecca Knox was not harmless beyond a reasonable doubt. The error was prejudicial, futhermore, even under the more likely than not standard of review applicable solely to errors of State law. This was a close case. First, the jury acquitted petitioner on Count 1. Second, resolution turned on the credibility of witnesses and this error tendered to bolster a crucial prosecution witness. Third, conflicting inferences could have been drawn from evidence.

Only two percipient witnesses to the events in the Knoxes' apartment testified for the prosecution: Rebecca Knox and Castro. The jury easily could have rejected Castro's testimony. He explained that all the times were "fuzzy" because of his medification (RT 48) He suffered from a mental disorder, which

Ground 4 Supporting facts continued:

Caused him to hear things, hears yelling and believed people were coming to Kill him (RT 48; RT 50) Castro testified that his mental disorder caused him to believe events just like the ones he described with petitioner (RT 50) Thus, it was Rebecca Knox's testimony that carried the day for the prosecution. Still, the record shows the jury did not entirely believe Rebecca Knox's testimony completely even without the impeaching evidence. The jury acquitted petitioner of Count 1

The case pitted the petitioner's credibility against Rebecca Knox's credibility. The rule is that any substantial error that tends to bolster or corroborate the prosecution's case must be deemed prejudicial on review.

Based on the foregoing, the exclusion of the defense impeachment evidence was prejudicial and the conviction should be reversed.

(b) GROUND [redacted]: Five: (See Attached Ground 5)

Supporting FACTS: (See Attached)

Did you raise GROUND TWO in the California Supreme Court?

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): Petition for Review

(2) Case number or citation: D046320

(3) Result (attach a copy of the court's opinion or order if available): Review denied

Ground 5

The trial court erred in giving Caljic Number 2.52, the Statutory flight instruction, over defense objection thereby violating petitioner's due process rights. In the alternative the patter instruction required modification and preliminary fact-finding in this case.

Supporting facts:

It was error to instruct, over defense objection, with Caljic number 2.52. Substantial evidence demonstrated that petitioner's departure had nothing to do with a consciousness of guilt to the charged offenses. Petitioner's life had been threatened by Chris Knox, who was armed with a baseball bat. The 911 tape also revealed that Rebecca Knox threatened to shoot petitioner in the face. (CT p. 9 ["I'm gonna shoot you in your face, you come up here again"]. The 911 tape, which was played to the jury, and for which they ~~all~~ also had a transcript (RT 76-77).

Thus, petitioner's departure did not support the consciousness of guilt inference permitted by the instruction. The instruction impermissibly diluted the prosecution's burden of proving the truth of the charges beyond a reasonable doubt, violated due process, and requires reversal of petitioner's conviction.

Defense counsel objected to the Court's instructing

Ground 5 Supporting facts continued:

with Caljic No 2.52. Counsel argued, "I don't think what happened was sufficient with flight." (RT 273) The court overruled the objection and gave the instruction (RT 273)

"Flight" exists where there is evidence that the petitioner "departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." Thus, the flight instruction should be given only where there is evidence of actual flight, which may be properly relied upon as tending to show guilt.

Where there is an innocent explanation for a defendant's leaving, the flight instruction is improper. Here, petitioner also immediately submitted to law enforcement authority and cooperated fully when he was stopped (RT 159; RT 164). Evidence supported an inference that petitioner left for several reasons, including that his life was being threatened. Where, as here, there was no evidence of actual flight, giving of Caljic No. 2.52 was error. There simply was no substantial evidence to support each of the four inferences prerequisite to giving the flight instruction.

Even if some flight instruction was appropriate, the pattern instruction required modification in this case. Here, because substantial evidence showed an innocent reason for petitioner's departure, the court

Ground 5 Supporting facts continued

should have modified the pattern instruction, and also instructed the jury it had to make preliminary factual findings before it could infer any consciousness of guilt from petitioner's departure. When there is evidence that suggests a reason for flight other than consciousness of guilt, then the court should instruct the jury more specifically that whether or not the evidence shows a consciousness of guilt, and what significance to attach to it, are questions of fact the jury must determine.

Additionally, the jury should have been instructed to make preliminary fact-finding before considering flight as consciousness of guilt. In order to indicate a consciousness of guilt, petitioner's reason for leaving had to have been to avoid observation or arrest. Whenever this preliminary fact is in question, the petitioner had a right to an instruction requiring the jury to determine whether the preliminary fact necessary to establish the relevance of the evidence exists and to disregard the evidence unless the jury finds that the preliminary fact does exist.

If the jury is permitted to find a consciousness of guilt without making the requisite preliminary factual findings, the prosecution's burden is lessened and there is danger of jury reliance upon an irrational or unjustified inference in violation of the petitioner's

Ground 5 supporting facts continued:

Sixth and Fourteenth Amendment rights. Here, a preliminary fact-finding was very important because the jury recieved evidence petitioner's life had been threatened by both Chris and Rebecca Knox. While, petitioner stated on cross-examination that he left to avoid arrest (RT 207-208), there also was substantial, unrefuted evidence showing he left for innocent (safety) reasons. Moreover, to the extent the jury could have inferred from the evidence that petitioner left to "cool down" (RT 219), just as he left the Knoxes' apartment, then his departure was innocent, and indeed should be encouraged by the law, and certainly carried with it no consciousness of guilt.

The instructional error was of constitutional dimension in that it permitted the jury to infer guilt if it found that petitioner fled, thereby lessoning the prosecution's burden and violating petitioner's rights to trial by jury and due process. Therefore, the standard of review is whether the error was harmless beyond a reasonable doubt. "[B]efore a federal constitutional error can be harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt. Because the instructional error impacted constitutional right, the

Ground 5 Supporting facts continued:

proper standard, however, is Chapman.

Under any standard of review, petitioner was prejudiced by the statutory flight instruction. The permissible inference of the instruction improperly undermined petitioner's presumption of innocence. Petitioner's leaving the scene where his life had been threatened by a yelling man armed with a baseball bat, and a yelling woman who threatened to shoot petitioner in the face, did not support an inference of guilt. Moreover, the instruction directed the jury's attention to flight. Even though the instruction was permissive, the instruction suggested that flight was one type of evidence of guilt that could "establish guilt" on all petitioner's alleged charges.

Based on the foregoing, petitioner's conviction on all counts should be reversed.

(c) GROUND [redacted]: Six (See Attached Ground 6)

Supporting FACTS: (See Attached)

Did you raise GROUND THREE in the California Supreme Court?

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): Petition for Review

(2) Case number or citation: D046320

(3) Result (attach a copy of the court's opinion or order if available): Review denied

Ground 6:

The Court erred by denying the defense request to instruct with Caljic Number 12.50 when the evidence warranted such instruction, and the failure to instruct impermissibly reduced the prosecution's burden of proof and violated petitioner's due process and trial rights.

Supporting facts:

The defense requested the court to instruct the jury with Caljic Number 12:50 (RT 279), but the court declined the request and thereby committed reversible error. (See RT 280)

Petitioner presented evidence that he possessed the short barreled shotgun for self-defense in three situations. He had been attacked six month before the charged offenses (RT 222); there was a lot of gang activity in his neighborhood (RT 231); and petitioner received specific threats from Chris Knox (RT 40) The evidence showed the need for protection in the area: the apartment complex had armed security guards on patrol in the complex daily from 6:00 pm to 2:00 am (RT 108)

Petitioner had a Constitutional right to have the jury determine every material issue presented by the evidence. The court's failure to give the requested instruction deprived petitioner of his constitutionally protected rights to due process right and to a jury trial.

Ground 6 Supporting facts Continued:

In discussions on jury instructions, the defense requested instruction with Caljic number 12.50:

Mr. Gulley: Yes Your Honor: There is some argument that 12.50, use of a firearm by a convicted felon self-defense, may be applicable in light of his testimony. (RT 279)

The trial court considered defense counsel's discussion of Caljic 12.50 to be a request for instruction (RT 28) The Court did so in spite of the inexact phrasing of the request, and perhaps in recognition of the overly obsequious manner in which counsel at times present requests to the bench. This Court should also view defense's counsel's comments as a request for instruction. However, petitioner submits that the evidence in this case also created a sua sponte duty to instruct with Caljic No. 12.50.

The court considered the instruction and declined to give it:

The Court: Okay. Back on the record. 12.50 entitled "Use of a firearm by a Convicted Felon Self-defense" is in the Courts view designed and restricted to those situations in which a person finds himself in a situation without any pre-planning, and a firearm is either close at hand or immediately given to him for purporses of self-defense, and he there fore process [sic] it under those

Ground 6 Supporting facts continued:

those spontaneous circumstances.

In the instant case, the evidence was that the defendant had possessed the firearms for, I think he said, two to three months that they've been in his house, and that's simply - and that he had to unlock a box to get to them, this does not appear to the court to be a situation which 12.50 would be applicable because it was not a spontaneous quick moving situation where he was tossed a gun to defend himself by somebody, which I think is what is required here.

So Mr. Gulley, I will decline to read 12.50 as requested by the defense and overrule your objection. (See RT 280).

There was substantial evidence petitioner possessed firearms for self-defense, but without a preconceived design. Petitioner's life had been threatened by Chris Knox before the incident on September 12, 2004. Castro, the victim in the charged incident, testified he had heard Chris Knox threatened to kill petitioner many times in during June through August 2004 (RT 27, 40) Petitioner testified about Chris Knox's threatening petitioner with a bat, a deadly weapon, before September 2004. (RT 213-215) On September 12, 2004, Chris Knox again threatened petitioner with a bat (RT 33, 74) Talvera testified Chris Knox also had threatened her

Ground 6 Supporting facts continued:

mother, Teich, the apartment manager (RT 172) Additionally, petitioner had been attacked at his apartment complex and required 16 stitches as a result (RT 222) Petitioner testified there was a lot of gang activity in the neighborhood where he lived. (RT 231) Other (prosecution) evidence also tendered to prove the need for protection in the area. The apartment complex had armed Security officiers on patrol in the complex daily from 6:00 pm to 2:00 am (RT 108) This would hardly be an expense the landlord would undertake if the circumstance did not warrant it.

The fact that petitioner possessed the firearm(s) for approximately six months was irrelevant to the court's duty to instruct with Caljic No. 1250. There was substantial evidence from multiple sources, including petitioner and Jose Castro, that Chris Knox had threatened petitioner's life, and did so while Knox himself was armed with a deadly weapon, a bat. The 911 tape itself also established that Rebecca Knox threatened to shoot petitioner in the face (CT. 9) That situation in petitioner's home environment created a peril against which he was permitted to defend himself. While the threats against petitioner's life did not present the immediacy of those threats, the threats were not imminent. Substantial evidence showed that on an ongoing basis petitioner was in "imminent peril" not only from Chris Knox, but also from the apartment complex

Ground 6 Supporting facts continued:

that he lived in. Additionally, he was in peril, and indeed already had been attacked due to the bad neighborhood where he lived. There were gangs in the area and he had suffered an attack requiring 16 stitches.

Further, petitioner's six-month possession did not equate to a "preconceived design." (See Caljic 12.50) The term "preconceived design" is even undefined in California law. But the fact that petitioner correctly anticipated a specific emergency situation did not make his possession part of a preconceived design. The question of whether petitioner possessed the firearm(s) for self-defense was a question of fact for the jury, not the judge.

The error is of federal constitutional magnitude and, at a minimum reversal is required unless the prosecution can demonstrate the error was harmless beyond a reasonable doubt. But because a defense was entirely omitted from the jury's consideration, case specific harmless-error analysis is not required and the error is reversible per se.

Even applying the inclination of California Courts to review this kind of error under a test determining whether the issue was resolved against the defendant in another context under proper instructions, the result here would be the same. The issue was never resolved by the jury against against petitioner in any context. Thus, this is the type of issue where this Court should

Ground 6 Supporting facts Continued:

not try to weigh the evidence relating to the ommitted defense theory. The result still would be that the wrong entity, a court, not the jury, would make a fact-finding. Petitioner was entitled to have his jury determine wheather he had an honest belief that he was in "imminent peril" such that he was justified in defending himself. The jury, not a reviewing court, was in aposition to view petitioner's demeanor and that of the other witnesses who testified about the threats in the neighborhood. The demeanor of those witnesses, and of petitioner, were central to a credibility determination which is the crux of this issue. Hence, this error is not susceptible to harmless error review. Accordingly, petitioner's conviction on Count 3 should be reversed.

Prayer For Relief

Petitioner, James H. Cunningham, in pro per, hereby humbly prays that this Honorable Court will take this Writ of Habeas Corpus Petition into consideration, grant him leave to argue these several arguable issues on Writ of Habeas Corpus, appoint him effective assistance of counsel, issue an Order to Show Cause, request the respondent file a return, grant the petitioner a new trial, a reversal of all his Convictions, or in the alternative, recall the remittitur and allow the petitioner to raise these several arguable issues on direct appeal.

Petitioner contends that he has tried very hard to present these arguable issues to this Honorable Court in a manner that would leave the conscientious judge in the state of grave doubt the petitioner recieved a fair trial, a just verdict, a fair sentence and effective assistance of counsel during both trial and on direct appeal.

In the event this Honorable Court issues an Order to Show Cause, petitioner respectfully requests this court appoint him effective assistance of counsel to represent him, so that his interest will be protected by professional representation (See Exhibit (C)).

23. Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?
☒ Yes ☐ No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: The Supreme Court of the State of California

(b) Case Number: Unknown

(c) Date action filed: February

(d) Nature of proceeding: Petition for Writ of Habeas Corpus

(e) Name(s) of judges (if known): Unknown

(f) Grounds raised: Please See Grounds (1-3) in instatnt First Amended Federal Habeas Petition.

(g) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing .... Stacey Gulley, Deputy Public defender #110660, 250 East Main St., Suite 600, El Cajon, Ca. 92020

(b) At arraignment and plea .... Same

(c) At trial .... Same

(d) At sentencing .... Same

(e) On appeal .... Susan Keiser #115762, [illegible] 3453 Ingraham St., #85, San Diego, Ca. 92109

(f) In any post-conviction proceeding .
I recently recieved assistance from a fellow inmate, Elliott Leo Griffin V-46065, who found, drafted and wrote these newly discover claims. (See Exh. A)

(g) On appeal from any adverse ruling in a post-conviction proceeding:
Same

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
☒ Yes ☐ No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
☐ Yes ☒ No

(a) If so, give name and location of court that imposed sentence to be served in the future:

(b) Give date and length of the future sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
☐ Yes ☐ No

28. Consent to Magistrate Judge Jurisdiction

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to procced before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of final judgment, by indicating your consent below.

Choose only one of the following:

☐ Plaintiff consents to magistrate judge jurisdiction as set forth above.

OR

☒ Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case.

29. Date you are mailing (or handing to a correctional officer) this Petition to this court:
February 20, 2008

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

NA

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

2/20/08

(DATE)

SIGNATURE OF PETITIONER

PLAINTIFF/PETITIONER/MOVANT'S NAME James H. Cunningham

PRISON NUMBER V-72323

PLACE OF CONFINEMENT California Men's Colony State Prison
P.O. Box 8101 (6267x)

ADDRESS San Luis Obispo, Ca. 93409-8101

United States District Court
Southern District Of California

James H. Cunningham,
Plaintiff/Petitioner/Movant

v.

John Marshall (Warden CMC-E)
Defendant/Respondent

Civil No. 07 cv 2183 DMS (RBB)
(TO BE FILLED IN BY U.S. DISTRICT COURT CLERK)

First Amended
MOTION AND DECLARATION UNDER PENALTY OF PERJURY IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, James H. Cunningham,
declare that I am the Plaintiff/Petitioner/Movant in this case. In support of my request to proceed without prepayment of fees or security under 28 U.S.C. § 1915, I further declare I am unable to pay the fees of this proceeding or give security because of my poverty, and that I believe I am entitled to redress.

In further support of this application, I answer the following question under penalty of perjury:

1. Are you currently incarcerated? (Yes) No (If "No" go to question 2)
   If "Yes," state the place of your incarceration California Men's Colony State Prison
   Are you employed at the institution? Yes (No)
   Do you receive any payment from the institution? Yes (No)
   [Have the institution fill out the Certificate portion of this affidavit and attach a certified copy of the trust account statement from the institution of your incarceration showing at least the last six months transactions.]

2. Are you currently employed? Yes (No)

a. If the answer is "Yes," state the amount of your take-home salary or wages and pay period and give the name and address of your employer.

b. If the answer is "No" state the date of your last employment, the amount of your take-home salary or wages and pay period and the name and address of your last employer.

My last employment was in 2004

3. In the past twelve months have you received any money from any of the following sources?:

a. Business, profession or other self-employment Yes (No)
b. Rent payments, royalties interest or dividends Yes (No)
c. Pensions, annuities or life insurance Yes (No)
d. Disability or workers compensation Yes (No)
e. Social Security, disability or other welfare Yes (No)
e. Gifts or inheritances Yes (No)
f. Spousal or child support Yes (No)
g. Any other sources Yes (No)

If the answer to any of the above is "Yes" describe each source and state the amount received and what you expect you will continue to receive each month.

NA

4. Do you have any checking account(s)? Yes (No)

a. Name(s) and address(es) of bank(s):
b. Present balance in account(s):

5. Do you have any savings/IRA/money market/CDS' separate from checking accounts? Yes (No)

a. Name(s) and address(es) of bank(s):
b. Present balance in account(s):

6. Do you own an automobile or other motor vehicle? Yes (No)

a. Make: Year: Model:
b. Is it financed? Yes No
c. If so, what is the amount owed?

7. Do you own any real estate, stocks, bonds, securities, other financial instruments, or other valuable property?

Yes ~~No~~ (No circled)

If "Yes" describe the property and state its value.________________________________

8. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support. NA

9. List any other debts (current obligations, indicating amounts owed and to whom they are payable):

NA

10. List any other assets or items of value (specify real estate, gifts, trusts inheritances, government bonds, stocks, savings certificates, notes, jewelry, artwork, or any other assets [include any items of value held in someone else's name]): NA

11. If you answered all of the items in #3 "No," and have not indicated any other assets or sources of income anywhere on this form, you must explain the sources of funds for your day-to-day expenses.

NA

I declare under penalty of perjury that the above information is true and correct and understand that a false statement herein may result in the dismissal of my claims.

DATE 2-20-08 ________________________

SIGNATURE OF APPLICANT

If you are a **prisoner** you must have an officer from your institution provide this official certificate as to the amount of money in your prison account. There are no exceptions to this requirement.

PRISON CERTIFICATE

(Incarcerated applicants only)

(To be completed by the institution of incarceration)

I certify that the applicant James H. Cunningham,
(NAME OF INMATE)

V-72323,
(INMATE'S CDC NUMBER)

has the sum of $__________ on account to his/her credit at __________

__________.
(NAME OF INSTITUTION)

I further certify that the applicant has the following securities __________

to his/her credit according to the records of the aforementioned institution. I further certify that **during the past six months** the applicant's ***average monthly balance*** was $__________,

and the ***average monthly deposits*** to the applicant's account was $__________.

ALL PRISONERS ***MUST*** ATTACH A CERTIFIED COPY OF THEIR TRUST ACCOUNT STATEMENT SHOWING TRANSACTIONS FOR THE SIX-MONTH PERIOD IMMEDIATELY PRECEDING THE FILING OF THE COMPLAINT PER 28 U.S.C. § 1915(a)(2).

2/20/08
DATE

____
SIGNATURE OF AUTHORIZED OFFICER OF INSTITUTION

____
OFFICER'S FULL NAME (PRINTED)

____
OFFICER'S TITLE/RANK

TRUST ACCOUNT WITHDRAWAL AUTHORIZATION
(Incarcerated applicants only)

(This form MUST be completed by the prisoner requesting to proceed in forma pauperis. An incomplete "Trust Account Withdrawal Authorization Form," or "Prison Certificate" will result in automatic denial of the prisoner's request to proceed in forma pauperis.)

I, ________________________________, request and authorize the agency holding me in
(Name of Prisoner/ CDC No.)
custody to prepare for the Clerk of the United States District Court for the Southern District of California, a certified copy of the statement for the past six months of my trust fund account (or institutional equivalent) activity at the institution where I am incarcerated.

I further request and authorize the agency holding me in custody to calculate and disburse funds from my trust fund account (or institutional equivalent) pursuant to any future orders issued by the Court relating to this civil action pursuant to the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Title VIII, §§ 801-10, 110 Stat. 1321 (1996).

This authorization is furnished in connection with a civil action filed in the Southern District of California, and I understand that, pursuant to 28 U.S.C. §§ 1914 and 1915(b)(1), the total amount of filing fees for which I am obligated is either ▫ $150 (civil complaint) or ▫ $5 (habeas corpus petition) (check one). I also understand that this fee will be debited from my account regardless of the outcome of this action. This authorization shall apply to any other agency into whose custody I may be transferred.

DATE 2/20/08 ________________________________
SIGNATURE OF PRISONER

EXHIBIT

Issues raised in Court of Appeal

1.) The trial court erred by denying appellants request to cross-examine Rebecca Knox regarding her prior domestic violence accusations against her husband, Christopher Knox, which she later recanted, and thereby violated appellants State and Federal Constitutional right to present a defense and to cross-examine witness against him.

2.) The trial court erred in giving Calgic Number 2.52, the Statutory flight instruction, over defense objection thereby violating appellant's due process rights.

3.) The court erred by denying the defense request to instruct with Calgic Number 12.50, when the evidence warranted such instruction, and the failure to instruct impermissibly reduced the prosecution's burden of proof and violated appellant's due process and trial rights.

Exhibit (A)

Issues raised in the California Supreme Court

1.) Whether the trial court erred by denying petitioner's request to cross-examine Rebecca Knox regarding her husband, Christopher Knox, which she later recanted, and thereby violated petitioner's State and Federal Constitutional rights to present and defense and to cross-examine witnesses against him.

2.) Whether the court erred by denying the defense request to instruct with Caljic Number 12.50 when the evidence warranted such instruction, and the failure to instruct impermissibly reduced the prosecution's burden of proof and violated petitioner's due process and trial rights.

3.) Whether the trial court erred in giving Caljic Number 2.52, the statutory flight instruction, over defense objection thereby violating Petitioner's due process rights.

Exhibit (B)

Supporting Declaration.

I James H. Cunningham, Petitioner in pro se, declares under the penalty of perjury, that his court appointed appellate counsel erred in failing to send the petitioner the Reporter Transcripts of the jury's vouidre.

Petitioner points out, that he cannot pinpoint whether his appellate counsel failed to augment the record to include the jury's vouidre, but only declares that he never recieved this missing portion of his Reporter Transcripts from his appellate counsel.

Petitioner also declares the following:

1.) That he is an African American Male

2.) Respectfully believes that the prosecution wrongfully used his peremptory challenges by eliminating African American males as perspective jurors.

3.) That his defense counsel objected and moved for a mistrial on the grounds that the prosecution wrongfully excluded several African American males out of the jury pool.

4.) The trial judge overruled the objection and denied the defense's motion for mistrial. and,

5.) That he told his appellate counsel about the action that transpired.

I, James H. Cunningham, declare under the penalty of perjury, I have read the foregoing and the above facts and statements are true to the best of my knowledge and beliefs. Excuted on this day of February 10, 2008, at San Luis Obispo, Ca.

Respectfully Submitted

(Exh. C)

S151640

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JAMES CUNNINGHAM on Habeas Corpus

The petition for writ of habeas corpus is denied. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756; *In re Swain* (1949) 34 Cal.2d 300, 304; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Lindley* (1947) 29 Cal.2d 709.)

SUPREME COURT
FILED
AUG 22 2007
Frederick K. Ohlrich Clerk
DEPUTY

GEORGE
Chief Justice

(Exh. E)

(Exh. F) p.1 of 3

The Supreme Court should not summarily deny this instant Petition because petitioner's claims are not untimely and unjustifiably delayed since he was not aware of the evidence, events, facts and law to support this petition, due to the lack of educational background of the petitioner.

There is, of course, no fixed limit on the time of application, and mere delay, no matter how great, will not compel denial. (See In re James (1952) 38 C.2d 302, 309, 240 P.2d 596 [Explanation of ignorance, illitercy, lack of friends to intercede and procure legal advice held sufficient].) In re Perez (1966) 65 Cal.2d 224, 228, 53 Cal.Rptr. 414, 418 P.2d 6 [three year delay between sentencing and filing of petition excused where petitioner had not completed 7th grade, was not knowledgeable about legal procedures, and diligently used resources availiable to prisoners for research and preparation of legal documents].) (See Exh. G).

Petitioner contends that this Honorable Court should not summarily deny this instant petition on the grounds that the petitioner

(EXh F.) p. 2 of 3

has a Fifth grade elementary education and if in wasn't for the help of a fellow inmate Elliott Lew Griffin V46065, petitioner would have never discovered these claims.

Petitioner further contends prior to the assistant of inmate Griffin, he was not aware of any information or law to even indiciate a factual or legal basis for various claims and had no reason to believe these claims might be made, especially after being represented by counsel on direct appeal. Moreover, petitioner declares that he is ignorant of the law, Knew nothing of his legal rights are procedures, no Knowledge of what a habeas petition was, or what it consisted of, (Which is proved by the fact that petitioner has a 5th grade elementary education (See EXh. G) and was unable to file this petition on his own) These claims were not raised in an earlier petition, due to the fact that petitioner is incarcerated in State Prison and faced with the scarcity of channels through which legal assistance is available to illerate prisoners.

Petitioner asserts, "to the extent that these claims were not raised in an earlier petition

(Exh. F.) p. 3 of 3

or on direct appeal is the result also of the inexcusable failure of his Appellate counsel to raise crucial assignments of error that arguably might have resulted in reversal deprived petitioner of effective assistance of counsel on direct appeal." (In re Smith (1970) 3 Cal. 3d 192, 202 [90 Cal. Rptr. 1, 474 P.2d 929].); In re Banks, supra, 4 Cal. 3d 337; See also People v. Rhoden 6 Cal. 3d 529.

Petitioner further contends for each of these various and foregoings reasons, including the Supporting declaration of inmate Griffin and the substantial factor that petitioner has a 5th grade elementary education, this Honorable Supreme Court should not procedually bar him from litigating the merits of these several claims on the bars of laches because with the assistance of inmate Griffin these claims were found in October, November 2007 and this Habeas Petition has been filed as diligently and as promply as the circumstances allowed.

(Please See (Exh. G) Elliott Griffin Supporting declaration and Petitioner's T.A.B.E Test score)

(Exh. G pg 1)

Elliott Griffin Supporting Declaration:

I, Elliott Lew Griffin declare the following:

1.) My name is Elliott Lew Griffin, my CDCR# is V46065 and I am currently incarcerated at California Men's Colony State Prison in San Luis Obispo, Ca.

2.) I have recently started my own program in helping assist illiterate inmates, and/or inmates with mental or medicial disibilities. Wherefore, petitioner, James H. Cunningham #V-72323 falls with 2 of these categories.

3.) I meet with, petitioner James H. Cunningham in October, 2007, to discuss his current legal issues. Upon meeting with petitioner, I reviewed petitioner's Reporter's Transcript and found several arguable issues. I discussed these arguable issues with petitioner and since November 2007, I have since then conducted an on-going investigation.

4.) In December 2007, I helped petitioner file a request for Stay and Abeyance, of his Federal Habeas Petition, so that he could return to the State Courts to exhaust these several newly discovered arguments that is contained in Grounds (1-3) of the instant Petition.

5.) Thus, I Elliott Lew Griffin, have recently

(Exh G) Pg 2.

discovered, investigated, wrote and presented these several newly discovered arguments that is alleged in Grounds (1-3) of petitioner's State and First Amended Federal, Habeas Petition's

6.) I further declare that, James H. Cunningham has an elementary grade education (See attached Petitioner's official T.A.B.E. Test Score). Petitioner Cunningham, particulary has trouble reading and and even harder time comprehending what he reads. Petitioner Cunningham also suffers from mental Health disorders and is currently CCCMS.

7.) I will also next help petitioner Cunningham, file a request for appointment of counsel to represent him for his lack of educational background and mental health disorder's

I, Elliott Lew Griffin, declare under the penalty of Perjury that I have read the above facts and Statements are true to the best of my Knowledge and beliefs. Excuted on February 10, 2008, at San Luis Obispo, California

Respectfully Submitted,
Elliott Lew Griffin
Elliott Lew Griffin
Petitioner in Pro Per Assistant.

(Exh. H.)

James H. Cunningham #V-72323
California Men's Colony State Prison
P.O. Box 8101 (6267x)
San Luis Obispo, Ca. 93409-8101
In Pro Se

United States District Court
Southern District of California

James H. Cunningham, Petitioner, VS. John Marshall (warden CMC-E) Respondent.	Case No. 07 cv 2183 DMS (RBB) Request for Stay and Abeyance of Petitioner's Federal Habeas Petition to Exhaust Several Unexhausted Claims in the State Court.

Petitioner, James H. Cunningham, in pro se, respectfully request this Honorable Court grant him him a stay and abeyance of his Federal Habeas petition, on the grounds that he has recently sent a Petition for Writ of Habeas Corpus to the California Supreme Court, to exhaust the newly discoverd Grounds (1-3) that are included in his First Amended Federal Habeas Petition, In wake of the U.S. Supreme Court recent decision in (Rhines v. Weber (2005) 124 S.Ct. 1528)

Petitioner basis this motion on the facts and memorandum points and authorities stating why this Honorable District Court should grant the petitioner a Stay and Abeyance.

Petitioner could not with due diligence present these unexhausted claims in the State Court based on the fact that the appellate counsel should have raised these several aguable issues on direct appeal, in which the claims were recently discovered and not Known to the petitioner until after the State Habeas proceedings were terminated, and petitioner's one year Federal statue of limitations had almost run out. Petitioner, who recently only became "aware" of the factual basis for Ground (1-3) by a fellow inmate named Elliott Lew Griffin, who immediately conducted an ongoing investigation, drafted and wrote the potentially meritorious claims. In addition, petitioner has a elementary grade education and suffers from mental health disorders, and thus, establishing a good cause for delay (In re Clark (1993) 21 Cal.Rptr. 2d 509)

Petitioner hereby sends this United States District Court, Southern District of California, the First Amended Federal Habeas Petition, on the grounds that Grounds (1-3) are unexhausted claims not presented and decided by the State Courts.

Wherefore, after careful review of the law, it has come apparent to the Petitioner's attention, that unexhausted claims can be presented to the California Supreme Court to ~~the~~ exhaust the unexhausted claims, while the petitioner's Federal Habeas Petition is stayed in the higher Court.

In addition, petitioner claims that after a ~~thorou~~ thorough search through trial records for Exhibits to support these claims, petitioner has immediately seeked relief in this District Court. The newly discovered evidence is a basis for relief on the grounds that petitioner was denied his Constitutional Fourth, Fifth, Sixth and Fourteenth Amendment rights during the course of his trial and on direct appeal.

Memorandum Points and Authorities:

A Federal Court has no power to hear a mixed petition, and must either 1.) Dismiss the entire petition without prejudice (meaning you can file again in Federal Court without running into the successive petition bar); or 2.) Allow the petitioner to dismiss the unexhausted claims and go forward in Federal Court with an Amended Petition containing only the exhausted claims.

Making one of the claims creates a dilemma for the Federal Petitioner. The problem with alternate (2) is that it requires the permanent dismissal of unexhausted claims (or unexhausted facts within otherwise exhausted claims) which might, upon exhaustion, have a better chance of sucess than the already exhausted claims.

The problem with (1) is that although the dismissal is without prejudice, the time spent in Federal Court prior to the dismissal is not tolled against the AEDPA Statue of limitations. Usually, by the time a Federal court gets around to issuing a ruling forcing the petitioner deal with a mixed petition, whatever time remained on the Statue of limitations will have been used up, so that it will be impossible to go back to state Court, exhaust, and come back to Federal Court without the new Federal Petition being barred by the statue of limitations.

In an effort to deal with the delimma, lower Federal Courts began offering the petitioner "Stay and Abeyance" as a third alternative, allowing the petitioner to dismiss the unexhausted claims but "Staying" the Federal Petition instead of dismissing it while the petitioner returned to the state Court to exhaust his unexhausted claims

In James v. Pliler, 269 F. 3d 1124, 1127 (9th Cir. 2001) it referred to it decision in (Calderon v. United States District Court (Taylor) 134 F. 3d 981 (9th Cir 1998) The Ninth Circuit noted that, on remand, the District Court "may exercise in discretion in determining whether to grant [Petitioner] A Stay [of his petition] while he attempts to exhaust the unexhausted claims

In (Kelly v. Small, 315 F.3d 1063, 1069-1071 (9th Cir. 2002) Cert. denied 533 U.S. 1042. (2003) It stated "The District Court must consider the alternative of staying the petition after dismissal of unexhausted claims, in order to permit petitioner to exhaust those claims, and then add them by Amendment to his Stayed Federal Petition". The Court observed that the exercise of [this] discretion .... is particulary appropriate for the petitioner to return to Federal Court within one year limitation period imposed by.... §2244 (c)

Stay and Abeyance allows the petitioner to return to State Court to exhaust the unexhausted claims, but as long as he files the state exhaustion petition promptly after dismissing his unexhausted claims and promptly returns to Federal Court after exhaustion is completed, the original Federal Petition, will be there waiting, and the petitioner can simply move to amend the stayed petition to add the newly exhausted claims.

The Court noted in (Zaruela v. Artuz, 254 F.3d 374 (2nd Cir. 2001) suggested that thirty days is sufficient time for a petitioner to return to Federal Court following final action by the State Court's "and declared that this seems reasonable."

The unexhausted claims are "Potentially Meritorous" because it will either reverse petitioner's conviction's or reduce petitioner's sentence, and good cause for the failure to exhaust the unexhausted claims before filing in Federal Court is shown based on the fact that these facts were not Know, and could not at any time been presented at an earlier time. (People v. Shipman (1965) 42 Cal. Rptr. 1; In re Clark (1993) 21 Cal. Rptr. 2d 509)).

Based on the foregoing reasons, petitioner humbly prays that this Honorable District Court will "grant" petitioner's Amended Motion for Stay and Abeyance, Stay petitioner's First Amended Petition, until the California Supreme Court has had a chance to rule on petitioner's unexhausted claims that he has set forth in Grounds (1-3) of his First Amended Federal Habeas Petition.

I, James H. Cunningham, declare under penalty of perjury, that I have read the above facts and statements and the foregoing is true to the best of my knowledge and beliefs.

Excuted this day on February 10, 2008, at San Luis Obispo, California

Respectfully Submitted,

Petitioner In Pro Se.

(Exh I.) 1 of 2

Petitioner, James H. Cunningham, in pro per, respectfully brings the instant Habeas Petition to this Honorable California Supreme Court, on the grounds that he had a Federal Habeas Petition pending in the United States District Court, Southern District of California on a Stay and Abeyance, and wish to exhaust State remedies of these claims set forth in Grounds (1-3), pursuant to California Rules of Court, rule 8.508(a).

Petitioner contends that this case presents no grounds for review under rule 8.500(b) and this instant petition is filed solely to exhaust state remidies, so petitioner can proceed with his Federal Habeas Petition.

Petitioner was convicted at jury trial in San Diego County, Superior Court, East County, of Assault with personal use of a firearm, in violation of Pen C§ 245(a)(2) and 12022.5(a), Possession of a firearm by a felon, in violation of Pen C§ 12021(a)(1), Possession of a Short Barreled Shotgun, in violation of Pen C§ 12020(a) and prior strike conviction and conviction of serious felony, in violation of Pen C§ 667.5(b) through (i) and subdivision (a). Petitioner was sentenced to a total term of 12 years with 85%

(Exh I.) 2of2

in State Prison.

Petitioner claims the factual and legal basis for these claims are made on the grounds that petitioner recieved Ineffective Assistance of Counsel on direct appeal when his Court appointed appellate counsel failed to raise arguable issues on direct appeal that arguably might have resulted in reversal and also Ineffective assistance of counsel during trial when his Court appointed defense counsel committed numerous errors, from failing to object and or raise several arguable issues during trial.

In addition, the revision of 1966, the pertinent provisions of article VI. Section 5, were incorporated in article VI. Section 10, which now provides in part: "The Supreme Court, court of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings.

STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

I am the party of the above entitled actions, a citizen of the United States and over the age of eighteen years, and a resident of San Luis Obispo County. My current address is:

James H. Cunningham # V-72323
California Men's Colony-East
P.O. Box 8101 Room 6267X
San Luis Obispo, CA. 93409-8101

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY, THAT THE FOREGOING IS TRUE AND CORRECT.
EXECUTED ON 2/20, 20 08, AT SAN LUIS OBISPO, CALIFORNIA, 93409-8101.

PETITIONER

....

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

I AM A RESIDENT OF SAID COUNTY, I AM OVER THE AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE ABOVE ENTITLED ACTION. MY BUSINESS ADDRESS IS:

Elliott Lew Griffin
CALIFORNIA MEN'S COLONY-EAST
P.O. BOX 8101 / Room 6255
SAN LUIS OBISPO, CALIFORNIA 93409-8101

ON ______________, 20______, I SERVED THE WITHIN First Amended Federal Petition for writ of Habeas Corpus, Case No. 07 cv 2183 DMS (RBB

ON THE PARTY: United States District Court Southern District of California

IN SAID ACTION, BY PLACING A TRUE COPY THEREOF IN A SEALED ENVELOPE WITH POSTAGE THEREON PREPAID, IN THE UNITED STATES MAIL, AT CALIFORNIA MEN'S COLONY, SAN LUIS OBISPO, CALIFORNIA, 93409-8101, ADDRESSED AS FOLLOWS:
United States District Court, Southern District of California
880 Front Street, Suite 4290
San Diego, Ca. 92101-8900

I DECLARE, UNDER PENALTY OF PERJURY, THAT THE FOREGOING IS TRUE AND CORRECT.
EXECUTED ON 2/20, 20 08, AT SAN LUIS OBISPO COUNTY, CALIFORNIA.

SIGNATURE OF DECLARANT

(REV.6/07)